UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

AULTMAN WOMEN'S BOARD CHILD CARE CENTER, INC.[1]	
Employer	
and	**Case No. 8-RC-16149**
OHIO ASSOCIATION OF PUBLIC SCHOOL EMPLOYEES (OAPSE) AFSCME LOCAL 4, AFL-CIO	
Petitioner	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding[2], I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

[1] The Employer's name appears as amended at hearing.
[2] The parties have filed briefs that have been carefully considered.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

> All full-time and regular part-time employees in the classifications of head teacher, teacher assistant and kitchen aide, employed by the Employer at its Canton, Ohio facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.
>
> There are approximately 26 employees in the unit found to be appropriate herein.

The Petitioner seeks to represent a unit of "all full-time and regular part-time employees of the Employer in the classifications of head teacher, kitchen aide and teacher assistant, but excluding all office employees, clerical employees, confidential employees, and all guards and supervisors as defined in the Act."[3] The Employer contends that the unit sought should not include head teachers because they are supervisors within the meaning of Section 2 (11) of the Act. The Petitioner asserts, however, that the head teachers are not statutory supervisors and accordingly should be included in the unit.

The Employer is an Ohio not-for-profit corporation engaged in child care services. The Employer provides social services to approximately 72 young children, ranging in age from six months to six years and their families at its facility located at 125 Dartmouth Avenue, Canton, Ohio, 44710. The Employer employs 9 head teachers, 15 teacher assistants, and 2 kitchen aides. The Employer's Director of the Child Care Center, Denise Fitzpatrick, is responsible for

[3] The petitioned-for unit appears as amended at hearing. The parties stipulated that all the classifications in the unit sought, specifically the head teacher and Assistant Teacher positions, are not professional employees within the meaning of Section 2 (12) of the Act. Since the record contains no contrary evidence, I accept the stipulation that the employees in the unit are not professional employees within the meaning of Section 2 (12) of the Act.

managing the programs provided at this facility. An Assistant Director assists Fitzpatrick with the day-to-day operations of the facility.

The record reveals that each of the head teachers is assigned a specific classroom. As many as 9 teacher assistants are assigned to a specific classroom, and the remaining 6 are considered part-time staff who are assigned throughout the center as staffing needs require. The head teachers and teacher assistants are paid on an hourly wage scale. Head teachers earn between $7.35 an $8.55 per hour and typically work a 40-hour week. Teacher assistants are paid between $6.40 and $6.75 per hour. Full-time head teachers and teacher assistants receive identical benefits.

Fitzpatrick testified that the duties of a head teacher include preparation of daily activity schedules and lesson plans which do not have to be approved by the Director. The testimony of Fitzpatrick indicates that head teachers also assign work to the teacher assistants. Work assignments could include duties such as changing diapers or directing the children through finger painting exercises. The head teachers are also responsible for the classrooms to which they are assigned including the maintenance of a proper ratio of teachers to children in accord with the appropriate state licensing laws and standards.

The testimony of head teachers Linda Matthews, Anna Iraheta, Wendy Hubbard, and Carrie Morgan establishes that many of the day-to-day responsibilities of the teacher assistants are routine in nature and in accordance with the policy directives established by the Employer's Director.

Although Fitzpatrick testified generally on direct examination that head teachers have the authority to discipline and effectively recommend discipline, the record contains no specific instances of the authority required under the Act to establish supervisory status. In this regard,

Stacey Brooks, a teacher assistant, testified that she was verbally reprimanded by a head teacher for not following the proper procedure for changing diapers. The record reveals, however, that Brooks suffered no adverse consequences as a result of the incident.

In another incident which occurred after the petition in the instant case was filed, a parent complained to head teacher Carrie Morgan that her teacher assistant had made an inappropriate comment about the parent's child. The record reveals that Morgan took the matter to Fitzpatrick, who told Morgan to talk to her assistant. Morgan followed the directive given by Fitzpatrick, and no adverse consequences were suffered by the teacher assistant as a result of the conversation.

Another parent complained just a few days later to Morgan of another incident involving the same teacher assistant. The record reveals that after the second incident, the teacher assistant was issued a "verbal warning." Fitzpatrick gave Morgan the option of giving the verbal warning, which she declined to do. Fitzpatrick issued the verbal warning to the teacher assistant. Morgan also did not participate in preparing the documentation for the teacher assistant's personnel file.

According to the testimony of Brooks, teacher assistants are responsible for maintaining and submitting their own time sheets. Head teacher Linda Matthews also testified that the head teachers complete their own time sheets as well. The head teachers do not review or approve the time sheets of assistants, rather they are turned in to the Director's office.

The Employer contends that head teachers are responsible for directing teacher assistants as to when they can take breaks or leave work early. The record reveals, however, that pursuant to a memo dated December 29, 2000, signed by Fitzpatrick, either Fitzpatrick or her assistant director must be notified of all breaks and occasions when any staff person works through a designated break or rearranges a work schedule. The contents of the memo were supported by

the testimony of head teacher witnesses who asserted that the policy contained in the memo is currently in effect with regard to breaks and notifying the director or her assistant. In addition, the record reveals a memo distributed by Fitzpatrick and authored by her assistant, dated December 15, 2000, reflects that staff members may only call-off from work on their own behalf. The director or her assistant must be notified of a decision to send a staff member home, including a teacher assistant. Also, the record reveals that only the director or her assistant may approve leave, and that requests for leave must be made at least two weeks in advance of the date requested.

Section 2(3) of the Act excludes from the definition of "employee" "any individual employed as a supervisor." Section 2 (11) of the Act defines supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgment.

It is well established that the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, provided that the authority is exercised with independent judgment on behalf of management and not in a routine manner. ***Clark Machine Corp.***, 308 NLRB 555 (1992); ***Bowne of Houston, Inc.***, 280 NLRB 1222, 1223 (1986). It is also well established that the burden of proving supervisory status rests on the party asserting such status. ***Billows Electric Supply of Northfield, Inc.***, 311 NLRB 878 (1993); ***The Ohio Masonic Home, Inc.***, 295 NLRB 390 (1989); ***Tucson Gas & Electric Co.***, 241 NLRB 181 (1979).

In addition to enumerated powers in Section 2 (11) of the Act, the Board may also look to certain other factors as evidence of supervisory status, e.g., the individual's attendance at supervisory meetings, authority to grant time off to other employees, and the authority to evaluate employees. See ***Flexi-Van Service Center***, 228 NLRB 956, 960 (1977).

In applying the traditional criteria for the establishment of supervisory status to the facts of the instant case, I find for the reasons stated below that the Employer has failed to meet its burden of proving that the head teachers are supervisors within the meaning of Section 2 (11) of the Act.

The record reveals in this case that head teachers do not have the authority to hire employees or discharge employees, nor do they have the authority to make any effective recommendations in that regard. The head teachers also do not have authority to transfer, suspend, lay-off, recall, promote, assign or reward employees, or to adjust employee grievances.

While the Employer asserts that the head teachers generally have the authority to make effective recommendations with respect to teacher assistant transfers, the record does not support this assertion. The Employer contends that Fitzpatrick transferred a teacher assistant from Morgan's classroom based on Morgan's recommendation. The record reveals, however, that the situation involving Morgan and her assistant was a byproduct of miscommunication between the teacher assistant and the previous director, which resulted in the teacher assistant being inadvertently placed in the wrong classroom. The record reveals that the teacher assistant did not want to be placed in Morgan's room because of the age group in Morgan's classroom. This matter was brought to the attention of Fitzpatrick by both the head teacher and the teacher assistant. Fitzpatrick, in turn, attempted to assign the teacher assistant to other age groups, but

could not give either the head teacher or the teacher assistant any guarantee that they would not share duties in that classroom together.

The testimony of the Employer's Director also indicates that the head teachers have not been involved in the assistant teachers' evaluation process. Although the record reveals that the Employer's Director intends to involve head teachers in the hiring and firing process, the testimony of the Employer's Director clearly shows that the head teachers are not involved in the hiring or firing process at the present time. Thus, this evidence is speculative and insufficient to exclude head teachers from the unit as supervisors.

The record further reveals that head teachers do not have the authority to discipline employees or to effectively recommend discipline. Assuming, arguendo, that head teachers possess the authority to give oral reprimands, the Employer failed to present evidence to indicate that such warnings or reprimands affect an employee's employment history in any way. Thus, such "warnings" do not amount to discipline under the Act. ***North Shore Weeklies, Inc.***, 317 NLRB 1128, 1130 (1995)) ("the authority of the press supervisors to give oral counseling that carries no formal weight does not demonstrate the exercise of supervisory authority.") Likewise, in ***General Security Services Corp.***, 326 NLRB 312 (1998), the Board found that oral reprimands made by individuals were insufficient to confer supervisory status.

The evidence demonstrates that head teachers are not directly involved in further disciplining assistant teachers or other staff members beyond the oral warning stage. I find that the role the head teachers have in the Employer's disciplinary process is essentially reportorial in nature. Although the record reveals that head teachers have taken their concerns and recommendations regarding the staffing assignments of assistant teachers to the Employer's Director, the record shows that in at least one instance, that recommendation was not followed.

The mere factual reporting of employee infractions that do not automatically affect job status or tenure does not constitute supervisory authority. ***The Ohio Masonic Home, Inc.***, supra; ***Passavant Health Center***, 284 NLRB 887, 889 (1987).

The Employer contends that the head teachers should be deemed supervisors under the Act based upon the Board's decision in ***Superior Bakery, Inc.***, 294 NLRB 256, 261 (1989). In that case an employee was held to be a supervisor despite the fact that he could not hire, layoff, recall promote or discharge employees, but did have limited authority to transfer and assign employees, and his recommendations regarding discipline were often followed. That case, however, is distinguishable from the instant case because there is no evidence in the record that would suggest that any of the head teachers have the authority to transfer or assign employees, or that recommendations to that effect are regularly followed. In fact, the testimony of head teacher Carrie Morgan reveals that her recommendation that an assistant be transferred out of her room was not followed.

The Employer also relies upon ***N.L.R.B. v. Healthcare and Retirement Corp.***, 114 S.Ct. 1778, 1783 (1994); ***Cannon Industries Inc.***, 291 NLRB 632 (1988); and ***Control Services, Inc.***, 305 NLRB 435, Fn. 3 (1991), in support of its position that the head teachers are statutory supervisors because they exercise independent judgment in their direction of the assistant teachers' work, as well as in their authority to grant breaks and early dismissal times. The Employer's argument that head teachers use independent judgment in directing the assistant teachers is without merit, and the cases cited by the Employer are distinguishable based upon the record of the instant case. The record demonstrates that the work performed by the Assistant Teachers is routine and regimented. Assistant Teachers require very little, if any, direction in their work. I find that any guidance for such routine duties by the head teachers involves little or

no independent judgment, and accordingly, that factor is insufficient to make them supervisors under the Act. See ***Williamson Piggly Wiggly, Inc.***, 280 NLRB 1160, 1167 (1986), *enf'd.* 827 F.2d 1098 (6th Cir. 1987).

Also, the record clearly shows that the Employer's director or the director's assistant must be made aware of the arrangements made between head teachers and teacher assistants for break-time. The record reveals that both the head teachers and teacher assistants must work together to arrange their break schedules in order to remain in compliance with the state laws and regulations regarding teacher – child ratios. The Employer, however, generally asserts that the head teachers have ultimate authority to grant or deny break requests by the teacher assistants. In this connection, the Employer contends that head teacher Hubbard was able to convince Fitzpatrick that it should be permissible for a teacher assistant to combine her breaks in order that the Assistant may make a trip to a local store during the course of the work day. The record establishes that the assistant teacher was permitted to combine her breaks after the head teacher indicated to the Director that in doing so the teacher – child ratios would not be compromised. The record reveals, however, that the final decision with regard to combining the breaks rests with the Employer's director.

In ***Azusa Ranch Market***, 321 NLRB 811, 812 (1996), the Board held that three grocery store employees were not supervisors under the Act, despite the fact that they could tell other employees when to go on break. The Board further stated that "the fact that occasionally an employee's break may be delayed if the store is especially busy is insufficient to warrant a finding of supervisory status where, as here, there is no evidence that this decision is anything other than a routine clerical judgment." ***Id***. The record of the instant case reveals that head teachers and teacher assistants may delay breaks and work around their respective schedules in

order to maintain proper ratios. The record also reveals that if a teacher assistant wants to leave early, the head teacher cannot make the final decision on such a request. Any request for leave must be approved by the director or her assistant. Whether or not the request must be presented to the director or her assistant for final approval prior to the actual departure of the teacher assistant does not appear to be determinative of the issue, because in ***Azusa Ranch Market***, supra, the Board held that permitting employees to leave early on request, or to request, but not require, employees to stay late, was routine and insufficient to confer supervisory status on those employees.

To accept the Employer's argument that the head teachers should be considered supervisors under the Act would result in a ratio of 11 supervisory employees to 17 bargaining unit employees, or 1 supervisor for every 1.55 bargaining unit employees. Conversely, a finding that the head teachers are not supervisors would result in 2 supervisors and 26 bargaining unit employees or a ratio of 1 supervisor for every 13 bargaining unit employees. The ratio of supervisors to rank-and-file employees is a factor that may enter into Board consideration as a secondary indication when resolving a supervisory issue. ***Northwest Nursing Home, 313 NLRB 491, 498-499 (1993).*** Where the ratio is unrealistic, as it would be in the present case if the head teachers were to be deemed supervisors, the resulting ratio serves as an additional reason for finding the head teachers to be non-supervisory. ***Northwest Nursing Home, supra; United States Gypsum Co.***, 178 NLRB 85, 87 (1969).

Accordingly, based upon the foregoing and the record as a whole, I find that the head teachers are not supervisors within the meaning of Section 2 (11) of the Act and, accordingly, I shall include them in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid-off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or have been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Ohio Association of Public School Employees (OAPSE) / AFSCME, Local 4, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***N.L.R.B. v. Wyman-Gordon, Co.***, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses

of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by March 22, 2001.

Dated at Cleveland, Ohio this 8th day of March, 2001.

/s/ John Kollar

John Kollar, Acting Regional Director
National Labor Relations Board
Region 8

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